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CITATIONS

Cases:

540981—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 77

WILLIAM W. MCGREGOR, PERRY SHILTON, LOUIE HESS, ET AL., PETITIONERS

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The special findings of fact, conclusion of law, and opinion of the Court of Claims (R. 24–34) and its order denying petitioners' motion for a new trial (R. 34–35) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 7, 1942 (R. 34; Pet. 1). Petitioners' motion for a new trial was overruled on March 1, 1943. The petition for a writ of certiorari was filed on June 1, 1943. The jurisdiction

of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

1. Whether the Court of Claims may make findings of fact, concededly sustained by substantial evidence, which are contrary in their ultimate conclusion to those made by the commissioner of the Court of Claims in his report to the court.

2. Whether a judge of the Court of Claims was disqualified from participating in the hearing and determination of the case because he was Assistant Attorney General in charge of the Claims Division of the Department of Justice while the case was pending, where petitioners failed to object to his participation until after judgment was rendered against them.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, pp. 13–14 *infra*.

STATEMENT

By private Act of Congress, approved August 14, 1937 (50 Stat. 1052), jurisdiction was conferred upon the Court of Claims to "hear, determine, and render judgment, as if the United States were suable in tort, upon the claims" of the five petitioners herein "for damages resulting from personal injuries sustained by them in a

collision with a Civilian Conservation Corps truck on the public highway * * * in Mesa Verde National Park, Colorado." The five petitions duly filed in the Court of Claims pursuant to this Act alleged that the collision was caused by the negligence of the driver of the Government truck and that petitioners, who were riding in a private automobile owned and driven by McGregor, were free of contributory negligence (R. 1-24).

The cases were referred by the Court of Claims to a commissioner who received evidence and rendered a report in each case (R. 25). A majority of the court then made special findings of fact, to the effect that the Government truck and petitioners' car, coming from opposite directions, were approaching each other at about 20 miles per hour, the car travelling on the wrong side of the road; that the driver of the truck saw petitioners' car when 350 or 400 feet away, blew his horn in warning two or three times and applied his brakes; that petitioners' car continued to come towards the truck on the wrong side of the road, and when a collision seemed imminent, the driver of the truck turned it toward the left side of the road (the then vacant part of the highway), but at the same time McGregor, observing the truck for the first time, also cut his car to his right, causing the collision which injured all the petitioners (R. 25–26). The court found

as ultimate facts that the truck driver was free of negligence, and that McGregor was guilty of contributory negligence (R. 27). The court did not decide whether McGregor's negligence was imputable to the other petitioners who were passengers in his car (R. 32), although it found that all the petitioners were employed in the National Park, and regularly travelled between their homes and the Park in McGregor's car, sharing the expenses of its operation (R. 27). The court concluded as a matter of law that petitioners were not entitled to recover and rendered judgment for the United States (R. 28). Judges Jones and Littleton dissented, expressing the opinion that the truck driver was guilty of negligence and that petitioners were not guilty of contributory negligence (R. 33–34).

Petitioners then moved for a new trial, taking exception to the participation of Judge Whitaker in these cases because they were pending while he was Assistant Attorney General in charge of the Claims Division of the Department of Justice (R. 34). A unanimous court denied the motion, on the ground that "at no time did [Judge Whitaker] direct or participate in directing the conduct of these cases, nor did he have any knowledge of the facts or issues involved until the cases were argued before" the Court of Claims more than three years after he ceased to be Assistant Attorney General (R. 34–35).

ARGUMENT

It must be assumed that there is substantial evidence to sustain the findings of fact made below, that the ultimate findings are sustained by the findings of evidentiary or primary facts, and that the court made findings of fact on all material issues, for petitioners do not assign any such matters as error. *Cf.* Sec. 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 U. S. C. § 288 (b)). Petitioners merely argue that the facts reported by the commissioner, who found the driver of the Government truck negligent and petitioners free from contributory negligence, were binding on the court below unless not supported by substantial evidence or clearly erroneous (Pet. 6–8). They further argue that Judge Whitaker should have disqualified himself because he was Assistant Attorney General while the case was pending in the Court of Claims. Neither of these contentions presents ground for review by this Court.

1. *The Commissioner's Report.*—A. Assuming *arguendo* that the commissioner's report is entitled to the weight for which petitioners contend, petitioners have prevented appraisal of the report under this standard through their failure to have certified to this Court either the report or the evidence below. Petitioners do request that if a writ of certiorari be issued, the Court of Claims be directed to certify to this Court a complete transcript of the record including the commis-

sioner's report (Pet. 3, 8), but no grounds for the adoption of such an exceptional procedure have been suggested, and there is nothing in the record or the petition to explain petitioners' failure to designate the evidence for certification to this Court in the manner prescribed by statute and rules of court.[1]

In regard to the commissioner's report, petitioners argue that a long-standing custom of the Court of Claims excludes it from the record certified to this Court (Pet. 3). To assume that any such custom, if it does exist, extends to cases in which a petitioner has properly requested the inclusion of the report as "parts of the record * * * material to the errors assigned" would hypothesize a practice directly contrary to an ex-

[1] Pursuant to Sec. 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. § 288 (b)), Supreme Court Rule 41 requires that a petition for writ of certiorari to the Court of Claims be accompanied by "a certified transcript of the record in that Court, consisting of the pleadings, findings of fact, conclusions of law, judgment and opinion of the Court, and such other parts of the record as are material to the errors assigned." Court of Claims Rule 99 (b), also issued pursuant to the statutory authority cited, provides that "whenever a certified transcript of the record is requested" by a party "for the purpose of filing a petition for a writ of certiorari in the Supreme Court," and that party "desires not only the pleadings, findings of fact, conclusions of law, judgment and opinion of the Court but also 'other parts of the record as are material to the errors assigned,' [he] shall file with the Court, not more than forty-five (45) days after judgment has been entered," a copy of the petition and such other parts of the record.

plicit rule of court. See Court of Claims Rule 99 (b), providing for the inclusion in the certified record of such "other parts of the record as are material to the errors assigned," in accordance with a request made by the petitioner within 45 days after judgment. In any event, there is nothing in the record or petition to show that the court below was requested to include the report in the record.

B. Even if there is substantial evidence in the record to support the commissioner's "findings," the Court of Claims is not bound by them, and is free to reach independent conclusions in performing its statutory duty to make special findings of fact and conclusions of law. Petitioners' contention to the contrary is based upon the Act of February 24, 1925, Sec. 1, c. 301, 43 Stat. 964, as amended (28 U. S. C. § 269) and Court of Claims Rule 40 (Pet. 6–7). Neither source lends support to that contention. 28 U. S. C. § 269 authorizes commissioners of the Court of Claims to take evidence in cases that may be assigned to them by the court and to "make report of the facts in the case to the court." It directs the court to provide by rules "for a finding and report of facts by a commissioner, to be filed in court with the testimony upon which the same is based, and for exceptions thereto, in whole or in part, by the parties to the suit" and for "a hearing thereon." But "nothing in this section shall be so construed as to prevent the court from passing upon all questions and findings with-

out regard to whether exceptions were or were not taken at the hearings before the commissioner." This proviso clearly authorizes the Court of Claims to reject the commissioner's findings and independently to make its own findings. *Pratt* v. *United States*, 85 C. Cls. 1, 33, certiorari denied, 302 U. S. 750. Rule 40 merely authorizes the commissioner "to ascertain the facts, including ultimate facts, considered by him to be established by the evidence and make a report of his findings to the Court within a reasonable time." Nothing in this rule or any other rule of the court makes the commissioner's findings binding upon the court.

The court's power to make findings of fact independently of the commissioner's report is a necessary corollary of its statutory power—nowhere vested in the commissioner—to "hear" and "determine" causes brought before it, both under the special Act here involved (Act of August 14, 1937, 50 Stat. 1052) and under its general jurisdiction (Judicial Code § 145, 28 U. S. C. § 250).[2] The commissioners are merely "facilities" of the court to aid in its "disposition of suits brought therein" (Sec. 1 of Act of February 24, 1925, as amended; 28 U. S. C. § 269); and their

[2] It also follows from the requirement that, upon a writ of certiorari from this Court, the Court of Claims certify the findings of fact and conclusions of law (Sec. 3 (b) of Act of February 13, 1925, as amended; 28 U. S. C. § 288 (b)); and this clearly means the findings and conclusions of the court itself, not those of its commissioners. *Cf. Botany Worsted Mills* v. *United States*, 278 U. S. 282, 290; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205; Supreme Court Rule 41.

functions are to be analogized, not to those of a *nisi prius* tribunal charged with the initial determination of a cause, but rather to those of an examiner taking evidence and reporting the facts to an administrative board, which is free to exercise an independent judgment and arrive at its own findings of fact. *Cf. N. L. R. B.* v. *Tex-O-Kan Flour Mills Co.,* 122 F. (2d) 433, 437 (C. C. A. 5); *Burk Bros.* v. *N. L. R. B.,* 117 F. (2d) 686, 688 (C. C. A. 3); *N. L. R. B.* v. *Elkland Leather Co.,* 114 F. (2d) 221, 225 (C. C. A. 3); *N. L. R. B.* v. *Oregon Worsted Co.,* 94 F. (2d) 671 (C. C. A. 9). This analogy is reinforced by the fact that commissioners are given "the general duties that pertain to special masters in suits in equity" (28 U. S. C. § 269), whose findings, in absence of a statute or rule to the contrary, are purely advisory and leave the court free to make its own independent findings. *Ex parte Peterson,* 253 U. S. 300, 312, 313; *Basey* v. *Gallagher,* 20 Wall. 670, 680; *Quinby* v. *Conlan,* 104 U. S. 420, 424; *Kimberly* v. *Arms,* 129 U. S. 512, 523, 524; *Boesch* v. *Graff,* 133 U. S. 697, 705.[3] No statute

[3] In *Ex parte Peterson, supra,* Mr. Justice Brandeis describes commissioners and similar officials as "agents or officers of the court who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made. * * * Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties." See, also, *Field* v. *Holland,* 6 Cranch 8, 21; *Railroad Company* v. *Swasey,* 23 Wall. 405, 410.

or rule limits the Court of Claims in its weighing of the evidence.

2. *Alleged Disqualification of Judge Whitaker.*—Petitioners have waived any right to object to Judge Whitaker's participation in the hearing and determination of this case on the ground that he held the office of Assistant Attorney General for a time while the case was pending. Although at the time of the argument and submission of the cause petitioners were aware of Judge Whitaker's former office in the Department of Justice, they made no objection to his presence on the bench during oral argument, nor did they question the propriety of his participation in the determination of the matter when they submitted the cause for decision (R. 35). Their objection was first raised upon a motion for new trial after judgment had been entered against them (R. 34–35). Since it is not pretended that their motion was based upon any newly discovered facts, their failure seasonably to raise the issue constitutes a waiver of any right to protest. *Cf. Ex parte American Steel Barrel Co.*, 230 U. S. 35, 44; *Refior* v. *Lansing Drop Forge Co.*, 124 F. (2d) 440 (C. C. A. 6), certiorari denied, 316 U. S. 671; *Scott* v. *Beams*, 122 F. (2d) 777 (C. C. A. 10), certiorari denied, 315 U. S. 809. Petitioners should not be permitted to gamble on the outcome of the case, by withholding their objection to a judge's participation until his decision is handed down.

Apart from their inability to question Judge Whitaker's qualification after judgment, petitioners' contention has no merit. At common law judges could participate in causes in which they had been counsel. *Cf. Thellusson* v. *Rendlesham*, 7 H. L. Cases 429; *Duncan* v. *Atlantic Coast Line R. Co.*, 223 Fed. 446, 447 (S. D. Ga.); *Ex parte N. K. Fairbank Co.*, 194 Fed. 978, 986, 987 (M. D. Ala); *Eastridge* v. *Commonwealth*, 195 Ky. 126, 241 S. W. 806. Even under the statutory basis for disqualification of judges of the district courts, which is not made applicable to the Court of Claims, Judge Whitaker's participation in the instant case would have been unobjectionable.[4] In the Claims Division of the Department of Justice, as is frequently true of other large organizations, the work of the Division is performed in large measure by its staff, some of whose members are authorized to affix the signature of the Assistant Attorney General to various documents. In these circumstances, the mere fact that the judge's signature had appeared on the correspondence and pleadings in the cause would not in any substantial sense constitute his having "been of counsel * * * for either party" within the

[4] The test in the district court is whether the judge "is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial." Judicial Code § 20, as amended (28 U. S. C. § 24).

meaning of 28 U. S. C. § 24, relating to district judges. *Rose* v. *United States,* 295 Fed. 687 (C. C. A. 4); *cf. Aetna Insurance Co.* v. *Travis,* 124 Kan. 350, 259 Pac. 1068, certiorari denied, 276 U. S. 628; *Kirby* v. *State,* 78 Miss. 175, 28 So. 846. Since Judge Whitaker at no time directed or participated in directing the conduct of these cases, nor had any knowledge of the facts or issues involved until the cases were argued before the court more than three years after he ceased to be Assistant Attorney General (R. 35), the claim of disqualification would fail by any standards. *Cf. Rose* v. *United States, supra.*

CONCLUSION

The decision below is correct and does not call for review. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

OSCAR COX,
Acting Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
MELVIN RICHTER,
Attorney.

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